

DATUK MOHD SARI DATUK NUAR

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v.

IDRIS HYDRAULIC (MALAYSIA) BERHAD

HIGH COURT MALAYA, KUALA LUMPUR

DATO' KAMALANATHAN RATNAM JC

b

[COMPANIES (WINDING-UP) NO: D5-28-345-1995]

21 JUNE 1996

COMPANY LAW: *Winding-up – Whether just and equitable – Inability to pay debts – Sections 218(1)(e), (1)(i) & (2)(c) Companies Act 1965 – Whether petitioner having to prove both that debt due and respondent unable to pay debt – Test of insolvency – Whether quick assets test or overall assets and liability test to be applied – Reliance on year end accounts of respondent – Debt entered under “contingent liabilities” – Whether to be construed as an admission of debt or that provisions being made for contingent legal action – Whether winding-up petition improper pressure on public listed company.*

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EVIDENCE: *Winding-up petition – Whether petitioner having to prove both that debt due and respondent unable to pay debt – Reliance on accounts to prove inability to pay debts – Accounts of other public listed companies submitted from the Bar – Whether admissible – Debt entered under “contingent liabilities” – Whether to be construed as admission of debt or that provisions being made for contingent legal action.*

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CIVIL PROCEDURE: *Striking out winding-up petition – Petition based on inability to pay debt – Whether inability to pay debt can be decided during application to strike out petition – Debt disputed – Whether principle in Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd. applicable – Respondent a public listed company – Whether improper pressure on respondent – Whether petition an abuse of process – Whether petition can be struck out at the interlocutory stage – Consideration of s. 218(1)(e), (2)(a), (b), (c) Companies Act 1965 – Whether petitioner bound by pleadings in petition.*

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INTERPRETATION: *“Commercial insolvency” – Meaning of.*

WORDS & PHRASES: *“Balance sheet” – “Current assets” – “Current liabilities” – “Shareholder’s equity” – “Contingency” – “Renewal”.*

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The petitioner was the registered owner of shares in certain companies including one Sagisan Sdn. Bhd. (Sagisan) (“the entire shares” and “the total companies” respectively). Four of the total companies held timber concession licences allowing them to log timber within Sabah and the other companies were also connected with the timber industry.

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- a* By a sale and purchase agreement dated 9 September 1991 (“the 1991 agreement”), the petitioner sold the entire shares in the total companies to the respondent, a public listed company, for RM60 million. The 1991 agreement was later varied and several extensions were granted to the respondent to pay the balance purchase price. On 4 September 1993, a final agreement (“the completion agreement”), was signed on terms *inter alia* that; (a) the respondent would pay a consultancy fee of RM10 million to the petitioner on 8 September 1993; (b) the respondent would pay RM3 million to the petitioner to enable the latter to obtain the renewal of the Sakabina concession licence; and (c) the balance of the purchase price of RM20 million was to be retained as security pending the renewal of the Sakabina concession licence and if the renewal was not obtained before 31 December 1993, the sum was to be deducted from the purchase consideration and the petitioner was also to refund the RM3 million.

- d* On 8 September 1993, Dato’ Ishak, the group managing director of the respondent, issued his personal cheque of RM10 million (the Ishak cheque) made payable to a third party at the petitioner’s request which receipt was acknowledged by the petitioner in the completion agreement and the sum of RM3 million was paid to the petitioner. On 15 September 1993, the petitioner discovered Ishak had informed the third party that the Ishak cheque was his direct payment to the drawee. The petitioner then requested the issuance of a fresh cheque in its name but Ishak refused contending that the respondent’s obligations under the completion agreement had been satisfied.

- f* The petitioner claimed the balance of RM20 million on the basis that he had renewed the Sakabina concession licence and had informed the respondent of the same *vide* his solicitor’s letter which also contained a request for settlement of the said sum. In reply, the respondent demanded the issuance and delivery of the licence to the respondent on or before 31 December 1993. In compliance, the petitioner obtained the required documents from the respondent on 29 December 1993 and on the same day submitted them for processing.
- g* But on 3 January 1994, the respondent demanded the return of the original licence and all its documents. Therefore, the petitioner claimed that he was prevented from obtaining the issuance of the licence but as he had fulfilled his obligation, he claimed the debt due to him.

- h* The respondent failed to pay and the petitioner filed a petition to wind up the respondent pursuant to s. 218(1)(e) read with s. 218, and s. 218(1)(i) of the Companies Act 1965 (the Act) on the grounds that (1) the respondent was commercially insolvent applying the “quick assets test” ie, based on its annual accounts for the years ending 1993 and 1994, its current liabilities exceeded its current assets; (2) the respondent had admitted the debt was due and owing in its accounts under “contingent liabilities”; (3) the shares in Sakabina had been transferred to the respondent and the respondent had since September 1991 extracted and sold timber from all the concessions including the Sakabina concession; and (4) that it was just and equitable to wind up the respondent.
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The respondent applied to strike out the petition under the inherent jurisdiction of the Court and for an injunction to restrain the petitioner from proceeding with the petition on the grounds that (1) the petition was an abuse of the process as the respondent was not insolvent (2) the petition was brought to exert improper pressure upon the respondent (3) the debt was genuinely disputed and (4) there was no just and equitable ground for a winding-up order.

The respondent's application to strike out was heard first and at the hearing, the respondent submitted *inter alia* that under s. 218(1)(e) and (1)(i) of the Act, the petitioner had to prove both that the debt of RM30 million was indisputably due and owing and that the accounts of the respondent showed a current deficit. The petitioner argued that he need only prove the facts in the petition could found a petition to wind up a company and it was unnecessary to adduce evidence to prove those facts at an interlocutory stage. The petitioner further argued that the Supreme Court in *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95 held *prima facie*, an unpaid creditor was entitled to petition for a winding-up order against a company which failed to pay its debt. The respondent submitted that mere evidence of a current deficit in the accounts of the respondent did not prove that the company was unable to pay its debts and Counsel adduced the balance sheets of 15 public listed companies which also failed the "quick assets test". The petitioner objected to this evidence from the Bar and argued that the balance sheets without the rest of the accounts of the companies were not a proper basis for comparison.

The main issues were; the test to be applied in assessing a company's ability to pay its debts, whether the debt was disputed, and whether the petitioner had imposed improper pressure on the respondent in adopting winding-up proceedings.

Held:

- [1] A winding-up petition in itself must allege and prove the facts entitling the petitioner to present the petition.
- [2] The balance sheets tendered by the Counsel for the respondent are available to the public and the Court sees no reason for rejecting them. The Court does not consider such documentary evidence as evidence from the Bar. The balance sheets are also sufficient for purposes of ascertaining the deficiency of current assets over current liabilities in the quick assets test.
- [3] Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt the Court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, it is proper that its assets are also ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be

- a* ascertained liabilities. Therefore the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit.
- b* [4] From the balance sheet of the respondent there is a deficit of current liabilities over current assets of RM56,589,000 in 1994. However, there is a surplus of total assets over total liabilities and this surplus is RM329,664,000 which equals its shareholder's funds. The consolidated balance sheet of the respondent's group of companies shows that the group also has a surplus of total assets over total liabilities of RM462,168,000. By no stretch of the imagination can the respondent be said to be unable to pay its debts.
- c*
- d* [5] The view propounded by Counsel for the petitioner that just because current liabilities exceeded current assets the company was insolvent for the purpose of s. 218(2)(c) of the Act is incorrect. The Court holds that so long as sufficient evidence has been tendered to enable the Court to decide, the Court need not leave the question of the inability of a company to pay its debts to be decided only upon the hearing of the petition to wind up. The Court can decide this issue during the application to strike out the petition provided sufficient, cogent, undisputed evidence is before it to enable it to apply the "overall assets and liabilities test" as opposed to "the quick assets test". Therefore, "the quick assets test" is rejected.
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- f* [6] Since the respondent had entered this debt under "contingent liabilities" it makes no difference as to the type of language used. Whether there was legal action actually pending or legal action that has been threatened, which can be reasonably inferred from the correspondence, the issue remains the same i.e. the respondent did not unequivocally admit this debt. The Court therefore holds that it is accepted accounting practice to provide for pending or threatened litigation under the heading "contingent liabilities".
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- h* [7] With regard to the claim for RM10 million which Ishak had allegedly satisfied, it is clear that there is in existence a disputed debt. The respondent contend that they had fulfilled their obligation under the completion agreement and thus their refusal to entertain any request from the petitioner to issue a further cheque in the petitioner's favour. The petitioner claims that the liability of the respondent to pay the petitioner the RM10 million remains undischarged and that therefore the debt remains unpaid. The contrary submissions of both Counsel itself clearly show a dispute.
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- [8] In the *Morgan Guaranty* case, the principle of disputed debt as submitted by the respondent therein was accepted by the Court but it held that on the evidence, there was no such dispute. Hence that case ought not to be used as yardstick to give a petitioner a blanket guarantee that his petition will be heard in any event. Further, the Supreme Court was never given the benefit of hearing arguments concerning both “the quick assets test” and the “overall assets and liabilities test”. In the circumstances, that case does not bind this Court. This Court is satisfied that there is sufficient evidence to show that the debt is in dispute. a
- [9] The very fact that the petitioner being well aware prior to the presentation of this petition that the debt was in dispute, filed the petition and continued with it, was a clear indication of his intention to bring improper pressure to bear upon the respondent bearing in mind that the respondent is a public listed company having both a finance company and an insurance company as its subsidiaries. Since the winding-up petition is highly prejudicial to the respondent it ought to be struck out and the petitioner ought to proceed to recover his debt in the Civil Court. b
- [10] Any petition grounded on s. 218(1)(e) which is sought to be proved under s. 218(2)(a) or (b) or (c) and which is based on a debt which is in dispute, or which is bound to fail or is otherwise an abuse of the process can be struck out at the interlocutory stage. c
- [11] The petitioner has not pleaded any other ground aside from reliance on the statement of accounts to prove that the respondent is insolvent. Therefore, other than the statement of accounts he cannot rely on any other extrinsic fact or ground in support of his petition because the petitioner is bound by his petition and cannot traverse outside it. d
- [12] There ought to be a hearing, but not a hearing by way of petition. The petitioner ought to file a writ and go for trial. No injustice to the petitioner can be seen to prevail by allowing this application to strike out this petition. Therefore, the respondent’s application is allowed and the petition is struck out with costs. e

Per Curiam:

This Court ought not to be used as a debt collecting agency nor is it to be used as a stage where the machinations of disgruntled corporate directors are played out with unbridled vigour. This Court will not be used as a tool to propagate corporate disputes. Where it is clear that a winding-up proceeding is not the appropriate measure to be taken, it is the duty of the Court to send out a clear signal to corporate figures to desist from enjoining the Court into their fray. f

[Winding-up petition struck out with costs]

a Cases referred to:

Re Capital Annuities Ltd. [1979] 1 WLR 170 (**refd**)
Re Great Eastern Hotel (Pte.) Ltd. [1989] 1 MLJ 161 (**refd**)
Standard Chartered Bank Malaysia Bhd. v. Eng Song Huat [1996] 1 AMR 726 (**refd**)
Ng Hee Thoong & Anor. v. Public Bank Bhd. [1995] 1 CLJ 609 (**refd**)

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Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd. [1992] 1 MLJ 313 (**dist**)
Malaysian Plant Pte. Ltd. v. Moscow Narodny Bank Limited [1980] 2 MLJ 53 (**fol**)
Re Sanpete Builders (S) Pte. Ltd. [1989] 1 MLJ 393 (**dist**)

Perwira Habib Bank Malaysia Berhad v. Haji Abdullah bin Haji Sulaiman & Anor.
[1985] 2 CLJ 489 (**fol**)
Mann & Anor. v. Goldstein & Anor. [1968] 2 All ER 769 (**refd**)

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Mark Jaya Engineering Sdn. Bhd. v. LFY Construction Sdn. Bhd. [1990] 1 MLJ 372
(**cit**)

Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd. [1986] 1 MLJ 58 (**cit**)
Watta Battery Industries Sdn. Bhd. v. Uni-Batt Manufacturing Sdn. Bhd. [1990] 1 CLJ
578 (**cit**)

Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd.
[1991] 1 MLJ 95 (**not fol**)

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Chip Yew Brick Works Sdn. Bhd. [1988] 2 MLJ 447 (**refd**)
Lundie Brothers Ltd. [1965] 2 All ER 692 (**fol**)
Ng Tai Tuan & Anor. v. Chng Gim Huat Pte. Ltd. [1991] 1 MLJ 338 (**fol**)
Re Fildes Bros Ltd. [1970] 1 All ER 923 (**fol**)
Re Ringtower Holdings Plc [1989] 4 BCC 82 (**fol**)

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Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (i), (2)(a), (b), (c), (e)
Companies Act (Singapore), s. 254(1)(e), (2)(c)
Companies Act (UK), ss. 223(a), (b), (c)

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Other sources referred to:

Company Directors' Manual – The Australian Institute of Company Directors, pp. 435,
455
A Brief Guide to Generally Accepted Accounting Practices in Malaysia GAAP, Ernst
& Young, pp. 35, 39-41
Halsbury's Laws of England 4th Edn, Vol. 7(2), para. 1458

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Buckley on the Companies Act, 13th Edn., p. 460
Law of Company Liquidation, MacPherson, 3rd Edn.

For the petitioner - KS Narayanan (Viji Kumar, Joseph Yeo & Fiona M Bodipalar
with him); M/s. Sri Ram & Co.

For the respondent - Loh Siew Cheang (Ranjit Singh & Evelyn Khoo with him);
M/s. Cheang & Ariff

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JUDGMENT

Kamalanathan Ratnam JC:

The petitioner claims that a debt of RM30 million is due to him from the respondent. The petitioner has not sent a statutory demand under s. 218(2)(a) of the Companies Act 1965 (the Act) nor does he have a judgment, decree or order of the Court to be able to proceed under s. 218(2)(b). Instead he is proceeding under s. 218(1)(e) read together with s. 218(2)(c) in that the respondent is unable to pay its debts taking into account its contingent and prospective liabilities, and that due to this fact, it would be just and equitable to wind up the respondent under s. 218(1)(i).

The Background to the Petition

The petitioner was at all material times the registered owner of the entire shares representing the issued and paid up capital in certain companies including one Sagisan Sdn. Bhd. (Sagisan) (hereinafter referred to as “the entire shares” and “the total companies” respectively). Four of the total companies are holders of timber concession licences enabling them to log timber in designated areas within the state of Sabah under the Sabah Forest Enactment 1968 whilst the other companies have assets and expertise connected with the timber trade.

By a share sale and purchase agreement dated 9 September 1991 (hereinafter referred to as “the 1991 agreement”) the petitioner sold the entire shares in “the total companies” to the respondent for a total purchase price of RM60 million. The 1991 agreement was subsequently varied on 30 January 1992 by a supplemental agreement (hereinafter referred to as “the supplemental agreement”) which extended the completion date of the 1991 agreement to 21 March 1992. By an addendum dated 7 May 1992 the completion date for the sale of the entire shares was extended to 21 May 1992 with a right to the respondent to apply to the petitioner for further extension of time for payment of the balance purchase price till 9 September 1993 subject to the payment of interest. By a letter of extension dated 21 May 1992 the completion date was again extended to 10 June 1992.

The petitioner contended that pursuant to the agreements hereinbefore referred to the respondent had since September 1991 taken control and possession of the total companies to the exclusion of the petitioner and that the respondent has also been extracting and selling the timber products.

The petitioner also contended that the respondent did not complete the sale on the date agreed earlier though it continued to enjoy the benefits accruing from the assets and concession licences of the total companies. A final agreement contained in a letter with regard to the completion of the 1991 agreement dated 4 September 1993 (hereinafter referred to as “the completion agreement”) was signed and the terms *inter alia* were that:

- a* (a) The respondent would pay a consultancy fee of RM10 million to the petitioner on 8 September 1993.
- (b) The respondent would make available RM3 million to the petitioner to enable the latter to obtain the renewal of the Sabakina concession licence.
- b* (c) The balance of the purchase price of RM20 million will be retained as security pending the renewal of the Sabakina concession licence and if the renewal was not obtained before 31 December 1993 the said RM20 million was to be deducted from the purchase consideration and the petitioner was also to refund the RM3 million.
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d On 4 September 1993 one Dato' Hj Ishak bin Ismail (Ishak) who at all material times had been negotiating with the petitioner on behalf of the respondent as its group managing director issued his personal cheque for RM10,000,000 (the Ishak cheque). The said cheque was dated 8 September 1993 and was made payable to a third party as the petitioner intended to pay the third party with the sum due from the respondent. The receipt of the Ishak cheque was acknowledged by the petitioner in the completion agreement. The further sum of RM3 million was paid to the petitioner on 8 September 1993. As there was a mistake in the name of the drawee in the Ishak cheque the petitioner met up with Ishak to get the name altered. On 8 September 1993 the petitioner gave the Ishak cheque to the third party.

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f On 15 September 1993 the petitioner got to know that Ishak had written a letter to the third party contending that the sum paid *via* the Ishak cheque was not that of the petitioner's, but was Ishak's own payment to the drawee. The petitioner thus requested the respondent or Ishak to issue a fresh cheque payable to him as the drawee so that he could bank the cheque into his own account and then reissue his own cheque to the third party. However, both the respondent and Ishak refused to do so contending that the respondent's obligations' under the completion agreement had been satisfied by the issuance of the Ishak cheque, the receipt of which the petitioner had acknowledged.

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h The petitioner also claims the balance of the purchase price of RM20 million due to him pursuant to the completion agreement as he submits that he had already fulfilled his obligation of renewing the Sabakina concession licence for the respondent. The petitioner was granted a power of attorney dated 13 September 1993 by the respondent which was expressed to be valid up to and including 31 December 1993, to enable the petitioner to apply for and obtain a renewal of the Sabakina concession licence. On 13 November 1993 the petitioner obtained a letter of approval for the renewal and informed the respondent of same *vide* his solicitor's letter dated 27 November 1993 and requested for the settlement of the RM20 million. In response the respondent demanded that the petitioner procure the issuance and the delivery of the licence for the Sabakina concession to the respondent on or before 31 December 1993.

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There then followed a dispute as to what were the obligations of the petitioner under the completion agreement and the petitioner replied that such was not a requirement of the completion agreement. Later the petitioner requested the respondent to furnish him with the requisite documents to enable him to do the needful. The petitioner states that he received the documents on 29 December 1993 and on the same day he submitted them for processing. However on 3 January 1994 the respondent demanded from the petitioner the return of the original licence for the Sabakina concessions and all other relevant documents, and it was thus the contention of the petitioner that he was therefore prevented from pursuing with the issuance of the new licence. However, as he had done his part, he contends that the balance RM20 million is a debt due to him.

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Petitioner's Basis in Presenting the Winding-up Petition

The petitioner contended that he had made repeated demands for the payment of RM30 million debt but the respondent had refused to pay. The grounds of his petition are that:

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- (1) The respondent is insolvent and unable to pay its debts by applying the "quick assets test" based on its annual accounts for the years ending 1993 and 1994 where its current liabilities exceeded its current assets;
- (2) The respondent had admitted and confirmed that the alleged debt was due and owing to the petitioner as it was entered in the petitioner's accounts as "Balance payable to vendors of the Sagisan Concession";
- (3) The shares in Sabakina Sdn. Bhd. (the company which was the initial licensed concessionaire of the Sabakina timber concession) had been transferred to the respondent, and the respondent had since September 1991 extracted and sold timber from all the concessions including the Sabakina concession;
- (4) It is just and equitable in the circumstances that the respondent should be wound up.

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In short, the petitioner contended that the respondent was unable to pay its debts within the meaning of s. 218(1)(e) of the Act read together with s. 218(2)(c) of the Act or that it is just and equitable to wind up the respondent within the meaning of s. 218(1)(i) of the Act.

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Respondent's Application (encl. 8) to Strike Out the Petition

The respondent applied to strike out the petition pursuant to the inherent jurisdiction of the Court and for an injunction to restrain the petitioner whether by himself or his servants, agents or anyone of them, whomsoever, in any manner howsoever, from proceeding with or prosecuting or taking any further steps in the presentation of the petition on the following grounds:

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- a* (1) the petition is an abuse of the process of this Court; and
(2) the alleged debt upon which the petition was presented is a disputed debt.

By consent it was agreed that I hear encl. 8 first.

- b* It was submitted that the respondent is a public listed company and that its principal activity is that of an investment holding company. Amongst the many subsidiaries of the respondent is a licensed finance company (Kewangan Bersatu Berhad) and a general insurance company (Talasco Insurance Berhad) dealing with both life and general insurance.

- c* The respondent's case is that the petition is an abuse of process and should be struck out *in limine* based on the following grounds:

- d* (1) It is not insolvent nor is it unable to pay its debts as alleged by the petitioner;
- (2) The petition was brought for a collateral purpose which was to exert improper pressure upon the respondent as a winding-up petition would evoke serious consequences in that it would paralyse trade, dispositions and dealings in the shares of the respondent;
- e* (3) The purported debt is genuinely disputed and by virtue of case law such disputes ought not to be tried by a winding-up Court but rather the civil Court;
- f* (4) A genuine dispute deprives the petitioner of *locus standi*, that is the petitioner ceases to be a creditor within the meaning of s. 217 of the Act and is thus not entitled to present this petition;
- (5) There is no just and equitable ground in the circumstances of this case for the Court to order a winding-up within the meaning of s. 218(l)(i) of the Act.

- g* It is the respondent's submission that in order for the petitioner to succeed under ss. 218(l)(e) and 218(l)(i) of the Act the petitioner must show that the alleged debt of RM30 million is undisputedly due and owing and that the accounts allegedly show that the respondent is unable to pay its debts in that
- h* its current liabilities exceed its current assets. In other words the petitioner must succeed on both facets. A failure to succeed on either or both grounds should result in the dismissal of the petition.

- i* It was submitted by the petitioner that for the purposes of encl. 8 he need only show that the facts stated in the petition can found a petition to wind up a company. He does not have to adduce evidence to prove those facts at an interlocutory stage.

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I am of the view that this is not a correct proposition of the law. A winding-up petition in itself must allege and prove the facts entitling the petitioner to present the said petition. *Halsbury's Laws of England*, 4th Edn., Vol. 7(2), para. 1458 states:

In his petition a petitioner must allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Insolvency Act 1986 or in any other enactment for making a compulsory order exist. Unless these allegations are contained in the petition, it is misconceived, and the Court will dismiss it ...

The Accounts of the Company

There are three ways by which the petitioner could prove that the respondent is unable to pay its debts, i.e, by way of s. 218(2)(a), (b) and (c) of the Act. Mr. Narayanan, lead Counsel for the petitioner confirmed that the petition is based on s. 218(2)(c) since no statutory notice was served on the respondent nor has a judgment been entered against the respondent.

Section 218(2)(c) reads:

(2) A company shall be deemed to be unable to pay its debts if:

...

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

It would seem clear that the petitioner has to prove to the satisfaction of this Court that the respondent is unable to pay its debts to fall within s. 218(2)(c) of the Act.

In the present case in order to satisfy the Court of the respondent's inability to pay its debts the petitioner relied on the respondent's accounts and submitted that the balance sheets for the years ending 31 December 1993 and 31 December 1994 showed that there is a deficiency of current liabilities as compared to current assets amounting to RM46,796,000 for the year ending 31 December 1993 and RM56,589,000 for the year ending 31 December 1994. By reason of the "quick assets test" the petitioner contends that the respondent is insolvent.

Mr. Narayanan refers to the annual report and statement of accounts to show that the current liabilities of the respondent exceeded its current assets by a sum of RM758,758,000 which sum is stated to be the net current liabilities of the respondent. *Prima facie* he submits the respondent is commercially insolvent and is unable to meet its admitted debt to the petitioner of RM30 million.

a The 'Quick Assets Test' or the 'Overall Assets and Liability Test'

Is the 'quick assets test' a proper test to ascertain a company's solvency or insolvency more so in the case of a public listed company, or is it proper for the Court to consider the proper test as being one which looks at all the assets of a company as against all its liabilities which I will call the 'overall assets and liabilities test'.

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In *Re Capital Annuities Ltd.* [1979] 1 WLR 170 a winding-up petition was presented by the company itself under s. 50 of the Insurance Companies Act 1974 on the ground of it being "unable to pay its debts". The evidence as to the company's financial state was in the form of a statement showing cash assets of £1,326,885 and present liabilities of £1,592,442. Thus the current financial state showed a deficit of £265,557. It was argued by the petitioning company that the deficit of £265,557 was less than what would be required to discharge the company's present liabilities and that there was a further liability to policy holders of £600,000. Thus it was submitted by the petitioning company that for the time being there was insufficient liquid assets to pay all its presently owing debts and therefore it was "unable to pay its debts". Slade J rejected this argument as mere evidence of a current deficit which did not prove that the company was unable to pay its debts. He further held at page 187:

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... As I have already indicated, I do not think it has yet been proved that the present contingent and prospective liabilities of the company exceed the present value of its assets; accordingly no inability to pay its debts in this sense has been proved ...

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In *Re Great Eastern Hotel (Pte.) Ltd.* [1989] 1 MLJ 161 a winding-up petition was brought against the company by one of its members on the ground, *inter alia*, that the company was unable to pay its debts within the meaning of s. 254(l)(e) of the Singapore Companies Act (the equivalent of the Malaysian s. 218(l)(e)).

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There being no statutory demand, the petitioner relied on s. 254(2)(c) (the equivalent to the Malaysian s. 218(2)(c)). The petitioner therefore had to positively prove insolvency. In support of the petition, the financial status of the company was put before the Court. As at 31 December 1987, there was a current asset deficiency of \$7,688,751.

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However, the company had an asset, that is a hotel, valued at approximately \$21 million.

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Counsel for the petitioner submitted that the fact that the company's assets exceeded its liabilities did not mean that the company was solvent. He contended that the test was that there should not be a deficiency on current

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assets. He also submitted in order to be solvent, the company must be able to pay its debts out of its own money and could not borrow money to do so.

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Grimberg JC rejected Counsel's argument and held that the test for solvency is not whether there is a deficiency of current assets over current liabilities ("quick assets test"). He also rejected the argument that a company could only be solvent if it was able to pay debts out of its own money.

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In fact Grimberg JC held at page 172:

... Indeed it was demonstrated to me by Mr. Lyndon-Stanford that, were the quick assets test to be the test for solvency, some 20 companies listed in the Stock Exchange of Singapore would be insolvent on the basis of their last published accounts, because each has a deficiency on current assets ...

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In fact, in the present case it was also demonstrated to me by Mr. Loh, lead Counsel for the respondent, that about 15 public listed companies in Malaysia would be in a similar situation. Mr. Narayanan submitted that the tendering of a list of Malaysian public listed companies whose current, liabilities exceeded their current assets in their balance sheets which demonstrated that these had failed the quick assets test, by Mr. Loh, was in effect adducing evidence from the Bar and he asked that such evidence be excluded. Even if I were to accept the same, Mr. Narayanan argues that they were merely the balance sheets without the rest of the accounts of the companies concerned and were therefore not a proper basis for comparison.

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No doubt, Mr. Loh must have been motivated by the *Re Great Eastern* case to produce the list. I agree that in normal circumstances it would be wrong and indeed improper for Counsel to supplement the lack of evidence by his own views or opinions or statements from the Bar which views, opinions or statements might be tantamount to padding up the evidence on behalf of his client. In fact I had in *Standard Chartered Bank Malaysia Bhd. v. Eng Song Huat* [1996] 1 AMR 726 accepted and adopted the view expressed by Sri Ram JCA in *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 CLJ 609, 615 wherein his Lordship said:

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The practice of Counsel giving evidence from the Bar as was done in this case is to be deprecated.

However in this case what Mr. Loh did was to tender a list of public listed companies with their current assets and current liabilities indicating clearly that they would all fail the quick assets test as advocated by the petitioner. These balance sheets are all available to the public and I see no reason for rejecting them. Indeed if these balance sheets were incorrect Mr. Narayanan could have asked for time to enable him to write in to the relevant companies to seek clarification. I do not consider such documentary evidence as evidence from the Bar.

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- a* As to the contention that what was tendered were merely balance sheets without the rest of the accounts, I hold that the same was sufficient for purposes of ascertaining the deficiency of current assets over current liabilities in the quick assets test. *The Company Directors' Manual – The Australian Institute of Company Directors* at page 435 describes the balance sheet as follows:
- b*

3.0 The Balance Sheet

- c* 3.1. Understanding the balance sheet holds the key to understanding the basics of accounting. For the balance sheet shows, in summary form, the overall framework within which the accountant operates ...
- 3.2. ... there are three general categories of items shown on a balance sheet:
- d*
- (a) Assets;
 - (b) Liabilities; and
 - (c) Shareholders' equity.
- ... Thus, in an example balance sheet:

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Total Assets	-	Total Liabilities (= Net Assets)	=	Total Shareholders' Equity
\$8,753,000	-	\$3,365,000	(= \$5,388,000)	(\$5,388,000)

In the circumstances, I hold that the approach taken by Mr. Loh was correct and I reject the objection taken by Mr. Narayanan.

- f* The management and conduct of a company is with its Board of Directors. On their broad shoulders rest the heavy responsibility of showing profits and to a shareholder this is reflected in the net rise in the value of the share in the company he holds and the resultant dividends that follow. Consequentially the Board ought to be given a free hand within the provisions of the Act to run its business as it deems fit. So long as it does not owe any one creditor an acknowledged debt that it is unable to pay, it ought to be given the opportunity to conduct its affairs freely. Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt the Court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, it is proper that its assets are also ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be ascertained liabilities. Therefore the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit.
- g*
- h*
- i* The terms "current assets", "current liabilities" and "shareholders' equity" have been defined in the *Company Directors' Manual - The Australian Institute of Company Directors* as follows at p. 455:

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current assets – cash or other assets expected to be used up or converted into cash within 12 months.

a

current liabilities – liabilities due and payable within 12 months.

shareholders' equity – The proprietorship section of a balance sheet, consisting of the share capital, reserves and retained profits. Represents the interest (equity) of the shareholders in the assets of the company.

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This 12-month decisive period is also accepted in accounting practices in Malaysia. (See *A Brief Guide To General Accepted Accounting Practices In Malaysia (GAPP)* by Ernst & Young pp. 39-41.) According to this guide a balance sheet has 3 general categories of item, namely:

c

(a) assets

(b) liabilities

(c) shareholders' equity/funds

d

The ultimate result of a balance sheet is represented as follows:

Total Assets - Total Liabilities (= Net Assets) = Total Shareholders' Equity/Fund

I reproduce herewith the balance sheet of the respondent as at 31 December 1994:

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	NOTE	1994 RM'000	1993 RM'000
CURRENT ASSETS			
Cash and bank balances		14	8
Deposits with financial institutions	3	43	6,230
Other debtors	5	9,319	5,922
Other investments	12	–	69,480
		9,376	81,640
CURRENT LIABILITIES			
Short term borrowings	9	13,833	59,774
Other creditors	10	52,132	68,662
		65,965	128,436

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NET CURRENT LIABILITIES		(56,589)	(46,796)
INTEREST IN SUBSIDIARIES	14	394,932	390,993
<i>b</i> FIXED ASSETS	16	2,747	2,478
TERM LOANS	19	(11,059)	(20,718)
LONG TERM LIABILITIES	20	(367)	(423)
		329,664	325,534
<i>c</i>			
SHAREHOLDERS' FUNDS			
Share capital	21	279,985	279,985
<i>d</i> Share premium		104,155	104,155
Reserves	22	(54,476)	(58,606)
		329,664	325,534

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From the balance sheet of the respondent there is a deficit of current liabilities over current assets of RM56,589,000 in 1994. However, there is a surplus of total assets over total liabilities and this surplus is RM329,664,000 which equals its shareholders' funds. By no stretch of the imagination can the respondent be said to be unable to pay its debts. The respondent being an investment

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holding company, derives most of its assets from its interest in its subsidiaries. The balance sheet figure shows such interest as amounting to RM394,932,000 in 1994. The consolidated balance sheet of the respondent's group of companies is shown in encl. 1 (p. 197). It is to be noted from the consolidated balance sheet that the position of the respondent's group of companies shows that the

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group also has a surplus of total assets over total liabilities of RM462,168,000. The net current liabilities of the group, however, exceed current assets in the sum of RM758,758,000 (RM2,190,388,000 – RM1,431,630,000). However, this net current liability position must be scrutinised. The figure of RM2,190,388,000 (current liabilities) is largely made up of depositors in the respondent's finance

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company subsidiary which is Kewangan Bersatu Berhad ('KUBB'). This is represented by "Deposits from customers to the amount of RM1,491,775,000. Pursuant to accounting principles, the said deposits are treated as a "current liability" as it represents a debt which is payable in the event that depositors wish to withdraw their deposits at any time. However, unless there is a run

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on KUBB it is highly unlikely that depositors would be rushing to KUBB to withdraw their funds all at the same time. If the said deposits were to be removed from "current liability" the position of the group would show a surplus in the current asset position of RM733,017,000 [RM1,431,630,000 – (RM2,190,388,000 – RM1,491,775,000)].

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Mr. Narayanan relied heavily on *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd.* [1992] 1 MLJ 313 in support of his argument that if the balance sheet showed that current liabilities exceeded current assets, the company was insolvent. He relied on the judgment of Gunn Chit Tuan SCJ at p. 320 which states:

... In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case (*Malayan Plant (Pte.) Ltd. v. Moscow Narodny Bank Ltd.* [1980] 2 MLJ 53) and cite the following observations from *Buckley on the Companies Act* (13th Edn.) at p. 460:

In such a case it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pounds: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Counsel argued that the above passage laid down the proposition that a company is commercially insolvent if it did not have current assets to meet its current liabilities. I am of the view that Counsel was incorrect in this respect. *Sri Hartamas* dealt with the petition involving the statutory presumption under s. 218(2)(a) of the Act, that is there was non compliance with the 21-day notice of demand served on the registered office of Sri Hartamas, which was also the case in *Malaysian Plant Pte. Ltd. v. Moscow Narodny Bank Limited*. The passage from *Buckley* cited by Gunn Chit Tuan SCJ continues as follows:

The particular indications of insolvency mentioned in paras. (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet demands upon it ...

Para. (d), however, now recognises and, in conjunction with s. 222(e), expressly authorises a winding-up in the case of another kind of insolvency; that is to say, if the existing and probable assets will be insufficient to meet the liabilities, taking into account not only liabilities presently due but also those which are contingent and prospective.

The words "paras. (a), (b) and (c)" in the first paragraph and the words "para. (d)" in the second paragraph refer to s. 223(a), (b), (c) and (d) respectively of the UK Companies Act. Section 223(a) and (b) of the UK Companies Act 1948 find its equivalent in s. 218(2)(a) and (b) of the Act. Section 223(d) is *in pari materia* to s. 218(2)(c) of the Act. There is no equivalent to the UK s. 223(c) in Malaysia. In fact, Grimberg JC in the *Great Eastern Hotel* applied the test stated by *Buckley*, ie, the balance sheet test. There are further grounds for rejecting Mr. Narayanan's submission on this score. The fact that the statement in *Buckley* cited in the *Sri Hartamas* case is confined to a case

- a* where a statutory demand was served is further evidence from the facts of *Sri Hartamas* itself. In fact learned Counsel for the appellant company, Mr. Sri Ram (now Gopal Sri Ram JCA) sought to rely on the *Great Eastern Hotel* case to argue that the statutory presumption which arose after failure to comply with the statutory demand could be rebutted by evidence that the appellant
- b* could pay all its debts by realization of its assets. The asset in question was land worth more than RM500,000,000. Counsel for the respondent, however, distinguished the *Great Eastern Hotel* case on the basis that it involved s. 254(2)(c) of the Singapore Companies Act (Section 218(2)(c) of our Act) whereas the *Sri Hartamas* case involved a statutory demand under
- c* s. 218(2)(a) of the Act. The Supreme Court accepted the respondent's Counsel's submission on this point and held that once the presumption of insolvency arose when the requirement of s. 218(2)(a) of the Act had been satisfied, the company had to prove it was able to pay its debts. In doing so, even if the company had assets locked up and was thus "wealthy", it was
- d* commercially insolvent if after the statutory demand it was unable to meet current liabilities. In fact in the *Great Eastern Hotel* case Grimberg JC had occasion to consider the entire passage in *Buckley* which I reproduced earlier. In respect of the first paragraph of the passage in *Buckley*, the learned JC held that it related to what he referred to as the first test of insolvency which is a failure to pay demands for debts already due. In respect of the second
- e* paragraph of the passage in *Buckley*, the learned Judge held that the said paragraph was in respect of the second test of insolvency pursuant to the equivalent of s. 218(2)(c) of the Act which is whether there is a deficit of total assets against total liability of the company.
- f* Mr. Narayanan submits that the *Great Eastern Hotel* case though delivered by the Singapore High Court on 8 October 1988 was not referred to in the case of *Re Sanpete Builders (S) Pte. Ltd.* [1989] 1 MLJ 393 although the latter was delivered on 5 January 1989. It was submitted before me that the learned Judicial Commissioner's views there were consonant with those expressed by MacPherson on the *Law of Company Liquidation* (3rd Edn.)
- g* which were that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets, irrespective of whether the company is possessed of assets which if released, would enable it to discharge its liabilities to the full.
- h* Mr. Loh points out that both *Re Sanpete* and *Great Eastern Hotel* were reported in the [1989] 1 MLJ issue and hence the *Great Eastern* case could have been unavailable to be cited in *Re Sanpete*. I find that this must be so. To say that just because a case was not referred to in another judgment implied that the said case had no merits is a submission that in itself is devoid
- i* of merit. Even if the arguments in *Great Eastern Hotel* was unacceptable to the learned Judge in *Re Sanpete* surely if the same had been cited to him, or if he was aware of it by his own industry and research, he would have as an arbiter of legal principles, considered the said case and stated his reasons

as to why he either agreed or disagreed with the views expressed by the learned Judge in *Great Eastern Hotel*.

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What has to be distinguished in *Re Sanpete* is that the Court found that the accumulated losses of *Sanpete* were in excess of its capital, ie, that *Sanpete* had even lost its paid-up capital. In contrast, in the present case the respondent has not lost its capital and in fact the respondent has shareholders' funds in excess of the paid-up capital. Further, the assets of *Sanpete* were only book debts; whereas the respondent in the present case before me had other assets apart from book debts. It must also be noted that the respondent has fixed assets and further assets in the form of investment in subsidiaries.

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However, in *Re Sanpete* like in the present case, the current liabilities exceeded the current assets. The main debtor of *Sanpete* was insolvent and the liquidators had indicated that any moneys payable to unsecured creditors was expected to be negligible. There was the added factor that *Sanpete* had settlement obligations with another sub contractor pursuant to a judgment obtained by the same sub contractor. This was not so in the present case. Finally there was no indication that fresh capital would be injected into *Sanpete* or that payment would be received by *Sanpete* from any source to enable it to discharge its debts to the petitioner. Upon reading the said judgment I cannot find any averment by the learned Judicial Commissioner of the law as propounded by Mr. Narayanan that just because current liabilities exceeded current assets the company was insolvent for the purpose of s. 254(2)(c) (our 218(2)(c)) of the Act. In fact it is my view that all the matters referred to above were considered cumulatively and found to contribute towards the conclusion of insolvency of *Sanpete*. I find firm support for this inference from p. 400 of his Lordship's decision in *Sanpete*.

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Proof that a creditor's debt has not been paid *per se* does not establish an inability to pay debts within the meaning of s. 254(2)(c). The conclusion of insolvency, generally speaking, ought not to be drawn simply from the evidence of a temporary lack of liquidity: *Sandell v. Porter (Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246).

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Therefore I hold that so long as sufficient evidence has been tendered to enable the Court to decide I need not leave the question of the inability of a company to pay its debts to be decided only upon the hearing of the petition to wind up. I can decide this issue during the application to strike out the petition provided sufficient, cogent, undisputed evidence is before me to enable me to apply "the overall assets and liabilities test" as opposed to "the quick assets test".

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In the circumstances I do reject the "quick assets test" and hold that the proper test to be applied should be the "overall assets and liabilities test".

i

a *Is there an Admission of the Debt when the Respondent Acknowledged the Same as Due to the Petitioner in His Statement of Accounts.*

It is the argument of the petitioner that the respondent has admitted the disputed debt in its accounts by confirming that there were those sums of money due and owing to the petitioner. The so-called debt was acknowledged as item 10 in the statement of account which reads as follows:

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10. OTHER CREDITORS

Included in other creditors are:

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Group and Company

	1993	1992
	RM'000	RM'000

d

Balance payable to vendors of the Sagisan Concession 10% deposit received in respect of the disposal of Promet (Langkawi) Resorts Sdn. Bhd. (PLR) and Mutiara Court Condominiums (MCC) (Note 32)	52,000	55,000
	7,800	—
	=====	=====

e

The respondent on the other hand argues that the provision in its accounts relating to the respondent's purported debt cannot amount to an admission that the said sums are due and owing to the following reasons:

- (i) That the provisions in the accounts included under "contingent liabilities" of the respondent for the year ending 31 December 1993 with this qualification:

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The vendors of the Sagisan concession have taken legal action to recover the balance payable to them as stated in note 10. The company in turn has made counter claims against the vendors for specific warranties not fulfilled under the agreement entered into. The directors are of the opinion that the likelihood of the above claim crystallising is remote and furthermore it is imprudent to recognise any gain arising from the counter claim at this juncture.

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The same qualification was made in respect of the 1994 accounts.

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A Brief Guide to Generally Accepted Accounting Practices In Malaysia GAAP by Ernst & Young defines "contingency" as follows at p 35:

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A contingency is a condition or situation existing at balance sheet date, the ultimate outcome of which will be confirmed only on the occurrence or non-occurrence, of one or more uncertain events. The resulting gain or loss, if any, is referred to as a contingent gain or loss. Examples of such conditions include:

- Pending or threatened litigation, claims or assessments.
- Product warranties or defects.

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- Guarantees of the indebtedness of other parties.
- Charges created to secure the liabilities of other parties.
- Bills of exchange discounted with recourse.

a

With regard to the reference to “legal action” the petitioner denies that he has taken legal action and that such reference to “legal action” was imaginary and misleading. The respondent however explains this by suggesting that “legal action” referred to the claims made by the petitioner in his correspondence. The petitioner argues that this explanation is unacceptable because the respondent had made reference to “legal action” as opposed to “claims”. I find that since the respondent had entered this debt under “contingent liabilities” it makes no difference as to the type of language used. Whether there was legal action actually pending or legal action that has been threatened, which can be reasonably inferred from the correspondence, the issue remains the same, i.e. the respondent did not unequivocally admit this debt.

b

c

I therefore hold that it is accepted accounting practice to provide for pending or threatened litigation under the heading “contingent liabilities”.

d

GAAP also explains the accounting view with regard to the likelihood of the contingency ever occurring.

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It says at pp. 35 - 36:

The accounting treatment of a contingent loss or liability is determined by the expected outcome of the contingency. The range of expected outcomes is often expressed using general descriptions such as:

f

- Probable (likely to occur).
- Possible (between probable and remote).
- Remote (slight chance of occurring).

In the circumstances when the directors of the respondent had clearly described the possible contingent claim of the petitioner as “remote” in both the 1993 and 1994 accounts it was the opinion of the directors that there was the least chance of the petitioner succeeding. In that context I cannot hold that the respondent had made either a calculated or a perfunctory admission of the disputed debt. In *Perwira Habib Bank Malaysia Berhad v. Haji Abdullah bin Haji Sulaiman & Anor.* [1985] 2 CLJ 489, 492 VC George J (as his Lordship then was) said:

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... The question is whether what is stated is an admission of fact and if so whether that admission entitles the applying party to judgment or order. The admission must be implied from all the circumstances but the Court must be satisfied that it amounts to an unequivocal admission for it to pronounce judgment by the summary procedure provided by O. 27 r. 3.

i

- a* I therefore hold that there is no clear admission of the disputed debt in question by the directors, in this case, just because they had made provisions for same in their statement of account for both the 1993 and 1994 years.

Is the Debt a Disputed Debt

- b* The respondent argues that the debt is indeed in dispute. They contend that with reference to the 1991 agreement referred to earlier there was no provision relating specifically to the Sabakina licences. It is common ground that the completion agreement forms the basis of the disputed debt.

- c* With regard to the claim for RM10 million which Ishak had allegedly satisfied, it is clear that there is in existence a disputed debt. The respondent contend that they had fulfilled their obligation under the completion agreement and thus their refusal to entertain any request from the petitioner to issue a further cheque in the petitioner's favour. The petitioner claims that the liability of the respondent to pay the petitioner the RM10 million remains undischarged and
- d* that therefore the debt remains unpaid. The respondent argues that prior to the filing of this petition, the petitioner had knowledge that the alleged debt of RM10 million was at all times in dispute. The contrary submissions of both Counsel itself clearly showed a dispute.

- e* With regard to the claim for RM20 million the respondent contends that by failing to renew the Sabakina licence by 31 December 1993 the petitioner had forfeited the right to the said sum of RM20 million.

On the other hand the petitioner contends that he had indeed obtained the renewal of the licence by 13 November 1993. However, the relevant portion of the said letter from the Chief Minister's Department to the petitioner reads:

- f*
2. Sila maklum bahawa permohonan tersebut adalah diluluskan tertakluk kepada penentuan keluasan kawasan dan syarat-syarat lain yang akan ditetapkan oleh Pengarah Perhutanan berdasarkan dasar pengurusan perhutanan secara berkekalan dan tertakluk kepada Enakmen Hutan 1968.
- g*

However, the definition of renewal in the completion agreement reads as follows:

- h* Renewal means a renewal or fresh licence or lease is issued/allowed by the appropriate authorities for a period of at least 5 years from the date of expiry either directly or indirectly to the purchaser or to Syarikat Sabakina Sdn. Bhd. or their nominees permitting the holder of the licence to immediately extract forest produce in at least the same manner and location and to the same extent as existing in the present licence. Such renewal shall be completed by delivery of the licence on or before the 31 October 1992, to the purchaser or its nominee.
- i* Renewal shall also mean the right to extract timber as a result of reforestation requirements.

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In the circumstances, it will be seen that renewal means delivery of the renewed licence to the respondent's nominee for a period of at least five years with a right to immediate extraction of forest produce in the same manner, location and extent of the Sabakina licence. In response to the allegation that the respondent delayed in providing the petitioner with various documents the respondent states that it was well within the knowledge of the petitioner that renewal meant actual delivery of the renewed licence to the respondent.

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b

In *Mann and Anor. v. Goldstein & Anor.* [1968] 2 All ER 769 Ungood-Thomas J held that the Court would restrain a petition where the debt was disputed by the company on some substantial ground. By substantial ground the learned Judge meant that it must not be some ground which was frivolous or without substance. He also held that winding-up was not a remedy intended by Legislature to enforce payment of a debt and that to pursue a winding-up petition in such circumstances was an abuse of the process of the Court.

c

This same principle was applied and adopted in *Mark Jaya Engineering Sdn. Bhd. v. LFY Construction Sdn. Bhd.* [1990] 1 MLJ 372; *Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58 and in *Watta Battery Industries Sdn. Bhd. v. Uni-Batt Manufacturing Sdn. Bhd.* [1990] 1 CLJ 578.

d

Mr. Narayanan referred to *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95 and argued that, as held by the Supreme Court *prima facie*, an unpaid creditor was entitled to petition for a winding-up order against a company which failed to pay its debt. Mr Narayanan urged me to follow the said decision.

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To see if Mr. Narayanan's customary persuasiveness could move me I had to consider the *Morgan Guaranty* case. I find that in that case the principle of disputed debt as submitted by the respondent therein was accepted by the Court but it held that on the evidence, there was no such dispute. Hence the *Morgan Guaranty* case ought not to be used as a yardstick to give a petitioner a blanket guarantee that his petition will be heard in any event. In that case there was also a supporting creditor. The Supreme Court was never given the benefit of hearing arguments concerning both "the quick assets test" and the "overall assets and liabilities test". In the circumstances the *Morgan Guaranty* case does not bind me. The Supreme Court in *Morgan Guaranty* referred to *Chip Yew Brick Works Sdn. Bhd.* [1988] 2 MLJ 447 in its decision not to strike out the petition before it.

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Chip Yew was a case which dealt with a statutory demand under s. 218(2)(a). The High Court granted an injunction to the respondent company restraining the appellant from advertising the petition.

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On the facts, the company had admitted a part of the debt as due and owing in its affidavits. Therefore, the Supreme Court held that it was caught under

a s. 218(2)(a) as having neglected to pay the debt and was deemed unable to pay its debts. As the amount of the admitted and unpaid debt was substantial and almost half of the amount claimed, the Supreme Court held the appellant should not be prevented from pursuing its petition and the injunction was therefore lifted.

b The Supreme Court in *Chip Yew* referred to *Re Welsh Brick Industries, Ltd.* [1946] 2 All ER 197 and adopted the principle in *Welsh Brick* that the Court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute. The Court can allow evidence to be adduced and evidence has been adduced at interlocutory stage to decide whether there is a *bona fide* dispute. The question is “is there a *bona fide* dispute?”. In the present case I find that there is a *bona fide* dispute on the evidence adduced.

d In any event, the *Welsh Brick* case involved a winding-up petition which was disputed on only one ground which is, that in the civil suit for the same debt, the Court had granted unconditional leave to defend pursuant to O. 14. In disputing the winding-up petition, no evidence was led to prove the dispute but for the fact of the unconditional leave to defend. The Court of Appeal held that the mere fact of unconditional leave being granted to defend, although a point to consider, did not automatically mean that there was a *bona fide* dispute. The lower Court should have gone into the evidence to decide whether there was a *bona fide* dispute. The Court of Appeal then appraised the evidence adduced and held that it was most “flimsy and of the most vague character” and therefore there was no *bona fide* dispute.

f In the present case I am satisfied that there is sufficient evidence before me to show that the debt is in dispute. This Court ought not to be used as, a debt collecting agency nor is it to be used as a stage where the machinations of disgruntled corporate directors are play acted with unbridled vigour. This Court will not be used as a tool to propagate corporate disputes. Where it is clear that a winding-up proceeding is not the appropriate measure to be taken, it is the duty of the Court to send out a clear signal to corporate figures to desist from enjoining the Court into their fray.

Improper Pressure

h The very fact that the petitioner being well aware prior to the presentation of this petition that the debt was in dispute, filed the petition and continued with it, was a clear indication of his intention to bring improper pressure to bear upon the respondent bearing in mind that the respondent is a public listed company having both a finance company and an insurance company as its subsidiaries. I hold that since the winding-up petition is highly prejudicial to the respondent it ought to be struck out. The petitioner ought to proceed to recover his debt in the civil Court. However, once he has judgment in the civil Court he can then come back to this Court pursuant to s. 218(2)(a) of the Act in the event the respondent refuses to pay the said sum.

Position of Law Relating to Section 218(2)(a), (b) and (c) of the Act

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The petitioner *vide* his written submission conceded that s. 218(2) of the Act dealt with the definition of “inability to pay debts” and that the provisions were evidential in nature. I agree with this proposition. The juxtaposition of s. 218(2)(c) and the words of the sub-section “a company shall be deemed to be unable to pay its debts” renders untenable any view other than that the word “deemed” is used to prescribe avenues of proving the inability of the company to pay its debts, as opposed to creating a statutory *ipse dixit*.

b

The petitioner further submits that in the case of s. 218(2)(a) and (b) of the Act, the presumption that the company is unable to pay its debts arises before the filing of the petition and that at the hearing of the petition, the respondent is obliged to rebut that statutory presumption, the burden of proof now having shifted to the respondent. However, in the case of s. 218(2)(c) of the Act, the position that is envisaged is one where the creditor has not served a statutory notice under s. 218(2)(a) nor has he the benefit of an unsatisfied judgment, decree or order under s. 218(2)(b) of the Act. Therefore, where the creditor chooses to proceed under s. 218(2)(c), the burden is on the creditor to prove, at the trial of the petition, to the satisfaction of the Court that the company is unable to pay its debts.

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With the above proposition of the law, I am unable to agree. I am of the view that s. 218(2) only provides the methods by which a petitioning creditor may prove the ground as stated in s. 218(1)(e) which is reproduced herewith:

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218(l) The Court may order the winding-up if:

...

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(e) the company is unable to pay its debts;

It is in my view an incorrect submission of the law when the petitioner contends that in cases of s. 218(2)(a) and (b) the presumption arises before the filing of the petition and that the position is different under s. 218(2)(c). I hold that the presumption under s. 218(2) only arises after adjudication by the Court and after the facts giving rise to the presumption are proved regardless of the means employed by a petitioner to prove the ground based on 218(l)(e). The Court is empowered to strike out a petition which relies on s. 218(l)(e) read with s. 218(2)(a) where it can be shown at the interlocutory stage that the petition is bound to fail or is an abuse of the process of the Court as the Court can hold that there is no necessity for a trial to determine whether the presumption under s. 218(2)(a) can be invoked. Clearly any petition grounded on s. 218(1)(e) which is sought to be proved under s. 218(2)(a) or (b) or (c) and which is based on a debt which is in dispute, or which is bound to fail or is otherwise an abuse of the process can be struck out at the interlocutory stage.

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a *A Petitioner Cannot Traverse Outside the Petition*

The petitioner has throughout his submission been contending that he requires a hearing to prove that the respondent is unable to pay its debts under s. 218(2)(c) of the Act. However it is common ground that in so far as the petition is concerned (which is the hearing the petitioner is referring to) the evidence relating to insolvency that the petitioner is relying rests with the statement of accounts for the years ending 1993 and 1994 which show that the current liabilities exceed the current assets for each of the two years. It is also common ground that the petitioner has not pleaded any other ground to prove that the respondent is insolvent. I hold that other than the statement accounts which the petitioner has adduced he cannot rely on any other extrinsic of fact or ground in support of his petition because the petitioner is bound by his petition and cannot traverse outside it. In *Lundie Brothers Ltd.* [1965] 2 All ER 692 Plowman J said at p. 699 (*per curiam*):

d... It seems to me that it would be wrong for the Court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity ...

eIn *Ng Tai Tuan & Anor. v. Chng Gim Huat Pte. Ltd.* [1991] 1 MLJ 338 Chao Hick Tin JC disallowed a petitioner from straying outside his petition when he said at p. 343:

fOther than a bare statement in para. 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition itself. I agreed with the submission of the Counsel for the company that it would be grossly unfairly to permit the introduction of such facts by affidavit at that late stage. The company had hardly an adequate opportunity to rebut.

gI think the following comments by Meggery J in *Re Fildes Bros Ltd.* [1970] 1 All ER 923 at p. 923 are most apt:

hIn cases in which there are no normal pleadings, it seems to me important that those who oppose a winding-up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack, let him first amend his petition.

iAccordingly, I ruled that for the purposes of the hearing I would disregard that affidavit which was filed to persuade the Court to wind up the company on the ground that it is generally insolvent.

**Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic
(Malaysia) Berhad**

[1996] 3 CLJ

Kamalanathan Ratnam JC

903

Based on the statements of accounts adduced by the petitioner himself I am satisfied in applying the overall assets and liabilities test that there are more than sufficient assets in the company to meet the petitioner's demand. Besides the debt itself is in dispute.

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I agree that there ought to be a hearing; but not a hearing by way of a petition. The petitioner ought to file a writ and go for trial. He will still have the right to cross examine parties. No injustice to the petitioner can be seen to prevail by allowing this application to strike out this petition. In fact upon obtaining the judgment against the respondent the petitioner can proceed to wind up the respondent if he is so minded to. I draw to mind the judgment of Peter Gibson J in *Re Ringtower Holdings plc* [1989] 4 BCC 82 at p. 84 where he said:

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If the applicants can satisfy the Court that the petitioner's claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pages, as this one does with the proposed amendments) be struck out forthwith.

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I therefore allowed the respondent's application (encl. 8) and struck out the petition with costs.

Reported by Cindy Chan

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